88-246 (1)

NO.

Supreme Court, U.S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1988

ROBERT A. BACHE, JR. ET AL
Petitioners

VERSUS

AMERICAN TELEPHONE & TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC., SOUTH CENTRAL BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS, INC., AND THE COMMUNICATION WORKERS OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALTER J. LEGER, JR.
Counsel of Record
LEGER & MESTAYER
600 Carondelet Street
9th Floor
New Orleans, Louisiana 70130
Telephone (504) 588-9043

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in confirming a district court grant of summary judgment on the basis that petitioner-plaintiffs failed to show a lack of fair representation on the part of respondent, the Communication Workers of America.

2. Whether questions of material fact preclude summary judgment on the issue of whether the arbitration clause of the collective bargaining agreement governing petitioners' employment applied to the Amended Memorandum of Agreement between the Communication Workers of America, AT&T and South Central Bell Telephone Company.

3. Whether the District Court's holding that no genuine issue of material fact existed as to the breach of the duty of fair representation by the union was clearly erroneous.

LIST OF PARTIES

In accordance with Supreme Court Rule 21.1(b), petitioners submit the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are, to-wit:

A. List of Petitioners

1. Robert A. Bache, Jr.
2. Sandra H. Bush
3. Joseph D. Clay
4. Jules B. Cleland
5. Anthony L. Icamina, Sr.
6. Ronald J. Joachim
7. Earl C. Lancashire
8. Michael R. Lannes
9. Jaunice J. Matthews
10. Robert E. Mc Crudden
11. Larry L. Mennesses
12. James G. Milliken
13. Patrick O. O'Donnell
14. Ernest M. Perkins

15. Morris J. Reeson

16. Charles M. Thomas

17. Frank Vidal

B. List of All Other Parties

18. American Telephone & Telegraph Company

19. AT&T Information Systems, Inc.

20. South Central Bell Telephone Company

21. AT&T Communications, Inc.

22. The Communication Workers of America

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in Bache, et al v. AT&T,
et al, C.A. No. 85-5435,
dated October 30, 1986,
and Judgment dated
October 30, 1986.....C-1

TABLE OF AUTHORITIES

Pursuant to United States Supreme Court Rule 19.4 petitioners hereby join in the Petition for Certiorari filed by Jo B. Bankston, Janet Bemiss, Any B. Brandt, Mary Patricia Bush, Linda Butler, Bonnie B. Carrere, Wayne P. Catalano, Eileen Durel, Rochelle Fugere, Iris Gueno, Joyce Gundermann, Raymond Lesene, Barbara Marto, Jeanne Piotrowski, Liesel Reuther, Sally Sensebe, and Shirley Weaver on June 16, 1988 in Consolidated Case No. 87-3327 in the United States Court of Appeal for the Fifth Circuit and incorporate the authorities relied upon therein by reference.

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Robert A. Bache, Jr., Sandra H. Bush, Joseph D. Clay, Jules B. Cleland, Anthony L. Icamina, Sr., Ronald J. Joachim, Earl C. Lancashire, Michael R. Lannes, Jaunice J. Matthews, Robert E. Mc Crudden, Larry L. Mennesses, James G. Milliken, Patrick O. O'Donnell, Ernest M. Perkins, Morris J. Reeson, Charles M. Thomas and Frank Vidal respectfully pray that a writ certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered March 23, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported

at 840 F.2d 283. (Appendix A). Petitioners' Petition for Rehearing was denied on May 11, 1988. (Appendix B). The opinion of the District Court for the Eastern District of Louisiana is not reported. (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1988. A petition for rehearing was filed and denied on May 11, 1988. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 states, in relevant part:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States

having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce ... and any employer whose activities affect commerce ... shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States ..."

2. Federal Rule of Civil Procedure 56, concerning summary judgment, provides in pertinent part:

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ...

(e) Form of Affidavits; Further Testimony; Defenses Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit, facts essential to justify the party's position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT OF THE CASE

Petitioners herein join in the Petition for Certiorari filed by Jo B. Bankston, Janet Bemiss, Amy B. Brandt, Mary Patricia Buch, Linda Butler, Bonnie B. Carrere, Wayne P. Catalano, Eileen Durel, Rochelle Fugere, Iris Gueno, Joyce Gundermann, Raymond Lesene, Barbara Marto, Jeanne Piotrowski, Liesel Reuther, Sally Sensebe, and Shirley Weaver on June 16, 1988 from the Judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1988 in Case No. 87-3327 which had been consolidated with the petitioners' appeal before the United States Court of Appeals for the Fifth Circuit.

Petitioners point out, however, that while both the Bache and Bankston petitioners were induced to transfer to AT&T Information Systems (ATTIS) effective January 1, 1984, the Bache petitioners, were laid off in the fall of 1984 rather than in 1986. When the

Bache petitioners were laid off the Communication Workers of America (CWA) filed grievances on their behalves which ATTIS denied. However, the CWA unilaterally decided not to proceed to arbitration on the petitioners' grievances stating that it made this decision unilaterally because it determined that the lay-offs resulted from economic conditions which were permissible under the CWA's interpretation of the language of the Amended Memorandum of Agreement (AMOA).

In August of 1985, ATTIS announced another massive lay-off of CWA employees. CWA then filed an unfair labor practice charge against ATTIS with the National Labor Relations Board on October 25, 1985. The CWA contended that the lay-offs resulted from divestiture-related reorganization causes and, therefore, violated the AMOA. On January 29, 1986, the NLRB regional director rejected CWA's position that the AMOA imposed

restrictions on ATTIS's ability to lay off workers and this decision was affirmed by the NLRB on April 21, 1986. The Bankston petitioners were then laid off in March of 1986. The minor differences between the two classes of petitioners are fully set forth in the opinion of the United States Court of Appeal for the Fifth Circuit in Appendix "A".

REASONS FOR GRANTING THE PETITION

Petitioners herein join in the assertion by the Bankston, petitioners that "[s]ubstantial questions of fact do exist ... as to whether the CWA, due to its history and involvement in this matter, was in any position whatsoever to fairly and properly meet its duty of fair representation." As was succintly stated by the Bankston petitioners:

> "Prior to the NLRB ruling, substantial dispute existed between the employer and the unions as to whether a seven year guarantee of employment was in fact intended in

the Amended Memorandum of Agreement of March 26, 1982. That such a guarantee existed was affirmatively represented to local union officials who in turn passed this information on to union members. Further, union officials allowed South Central Bell and ATTIS management personnel to represent to appellants that in fact such a guarantee existed without making any effort whatsoever to determine the true intent and meaning of the Amended Memorandum of Agreement and communicate that meaning to petitioners.

CWA representatives were aware of their interpretation of the AMOA. Nevertheless, the CWA arbitrarily refused to confront ATTIS and South Central Bell on the issue upon learning the position of the companies in 1984. Whether the CWA sought to 'coverup' its own negligence in negotiation or was simply not interested at the time, is open to discovery.

Also, and as noted above, ATTIS has contended that the disputes arising under the AMOA are not subject to the arbitration provisions of the collective bargaining agreement. It is probable that the CWA simply declined to oppose the company's position rendering any further attempts by petitioners to pursue their grievances mere vain and useless acts.

Petitioners contend, and the facts show, that the subsequent grievance

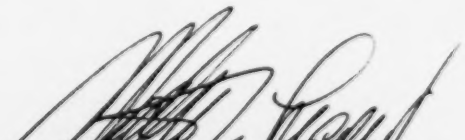
procedure in this instance was necessarily tainted due to the company's position that disputes under the AMOA were not subject to arbitration, and the union's arbitrary and discriminatory treatment of appellants. At the very least, substantial factual questions exist in this regard.

As to the breach of contract claims, substantial factual disputes exist regarding the intent and meaning of the Amended Memorandum of Agreement." (Petition for Writ of Certiorari filed herein on behalf of Jo B. Bankston, et al on June 16, 1988, p. 18 - 23).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



WALTER J. LEGER, JR.
Counsel of Record
LEGER & MESTAYER
600 Carondelet Street
Ninth Floor
New Orleans, LA 70130
Telephone: (504) 588-9043
ATTORNEY FOR PETITIONERS

APPENDIX A

Robert A. BACHE, Jr., et al.,
Plaintiffs-Appellants,

v.

AMERICAN TELEPHONE AND
TELEGRAPH, etc., et al.,
Defendants-Appellees.

Jo B. BANKSTON, et al.,
Plaintiffs-Appellees.

v.

AMERICAN TELEPHONE AND
TELEGRAPH CO., et al,
Defendants-Appellees

Carolyn CAREY, Plaintiff-Appellant,

v.

AMERICAN TELEPHONE AND
TELEGRAPH INFORMATION
SYSTEMS, INC., et al.,
Defendants-Appellees.

Nos. 87-3007, 87-3327.

United States Court of Appeals,
Fifth Circuit.

March 23, 1988.

Former employees brought action against their former employers for breach of collective bargaining

agreement and against labor union for breach of duty of fair representation following layoffs. The United States District Court for the Eastern District of Louisiana, Adrian C. Duplantier, J., entered summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, King, Circuit Judge, held that former employees' failure to exhaust grievance procedures or make sufficient showing of unfair representation precluded claims against their former employers for breach of collective bargaining agreement and against labor union for breach of duty of fair representation.

Affirmed.

1. Labor Relations 758, 777

Former employees' failure to exhaust grievance procedures or make sufficient

showing of unfair representation precluded claims against their former employers for breach of collective bargaining agreement and against labor union for breach of duty of fair representation arising from employment layoffs. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. Labor Relations 45

States 18.45, 18.53

Labor Management Relations Act preempted former employees' state law claims against former employers and labor union arising from employment layoffs. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. Labor Relations 759

Employee's cause of action against union for breach of duty of fair representation is implied from statutory

scheme of federal labor law. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations 416

General rule requiring exhaustion of administrative remedies under collective bargaining agreement is inapplicable if parties to agreement expressly agree that arbitration was not exclusive remedy for breach of contract claim at issue. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

5. Labor Relations 434.5

Collective bargaining agreement's grievance and arbitration procedures applied to disputes concerning amended memorandum of agreement covering continued employment of union members following employer's reorganization; collective bargaining agreement

specifically provided for partial amendments and supplemental agreements by mutual consent, and arbitration provision covered disputes "regarding the true intent and meaning of any provisions of this or any other agreement between the parties." Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

6. Labor Relations 416.1

Employer did not repudiate collective bargaining agreement's remedial procedures so as to excuse former employees from exhausting contractual remedies before bringing suit under Labor Management Relations Act; although employer's representative stated in unrelated arbitration proceeding that disputes arising under amended memorandum of agreement were not

subject to resolution through grievance and arbitration procedures, employer actually processed former employees' grievances. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

7. Labor Relations 416.1

Breach of union's duty of fair representation both excuses failure to exhaust contractual remedies and removes bar of finality provisions of contract. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

8. Labor Relations 777

Evidence presented by former employees who had been laid off was insufficient to show that union breached its duty of fair representation so as to excuse employees' failure to exhaust contractual remedies; employees claimed that union permitted employers to

fraudulently induce their transfers during reorganization and arbitrarily abandoned their case, but failed to show that union knew of misrepresentations at time they were allegedly made and offered no evidence that union failed to adequately investigate their grievances before deciding that arbitration was unwarranted. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

9. Labor Relations 218

Union's authority as collective bargaining representative necessarily empowers it to act according to its own reasonable interpretation of labor contracts. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

10. Labor Relations 221

Union does not breach its duty of fair representation by rejecting

employee's interpretation of collective bargaining agreement unless union's interpretatin is itself arbitrary or unreasonable. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

11. Labor Relations 221

Union's decision not to invoke arbitration after evaluating merits of former employees' grievances according to its interpretation of amended memorandum of agreement was a permissible exercise of union's discretion. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

12. Labor Relations 221

Union's assessment of merits of grievance may include determination of whether underlying theory continues to be valid. Labor Management Relations

Act, 1947, § 301, 29 U.S.C.A. § 185.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING (formerly Carolyn Dineen Randall) and DAVIS, Circuit Judges, and FELDMAN (District Judge of the Eastern District of Louisiana, sitting by designation), District Judge.

KING, Circuit Judge:

[1] Plaintiffs appeal from adverse summary judgments in suits against their former employers for breach of a collective bargaining agreement and against the labor union for breach of the duty of fair representation. Because the plaintiffs failed to exhaust grievance procedures or to make a sufficient showing of unfair

representation, the district court properly entered summary judgment against them, and thus we affirm.

I.

This is a consolidated appeal of cases brought by former employees of South Central Bell Telephone Company ("SCB") and American Telephone and Telegraph Information Systems, Inc. ("ATTIS"), whose exclusive bargaining representative was Communication Workers of America, AFL-CIO ("CWA"). The suits, originally filed in state court, alleged breaches of contract and fraudulent misrepresentation by the former employers and the labor union in connection with employment layoffs during the fall of 1984 and the spring of 1986. The defendants asserted that section 301 of the Labor Management

Relations Act ("LMRA"), 29 U.S.C. § 185, governed the claims and removed the cases to the United States District Court for the Eastern District of Louisiana. The district court subsequenlty granted the defendants' motions for summary judgment, and the plaintiffs timely appealed from the final judgments dismissing their suits.

The relevant facts presented to the district court are as follows. On January 1, 1984, American Telephone and Telegraph Company ("AT&T") divested itself of the Bell Operating Companies, including SCB, pursuant to court order in federal antitrust litigation. See United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). In preparing a plan

of reorganization, AT&T negotiated with labor unions concerning the continued employment of union members, and on March 26, 1982, AT&T and CWA executed an Amended Memorandum of Agreement ("AMOA"). The AMOA provided, among other things, that the collective bargaining agreement in effect at SCB would continue to apply to employees who transferred from SCB to a new AT&T subsidiary or affiliate. The AMOA also contained provisions concerning the employment rights of transferred employees; these provisions became the subject of later dispute between ATTIS and CWA and established the basis for the present suits.

In the fall of 1983, all of the plaintiffs in these cases were SCB employees with substantial seniority,

and on or about January 1, 1984, all transferred from SCB to ATTIS (then named American Bell Company). The plaintiffs state that they transferred because company and union representatives assured them of job security at ATTIS, because various informational materials represented that the AMOA guaranteed their continued employment for seven years after transfer, and because SCB told them that the type of work they were doing would be performed at ATTIS in the future. During the fall of 1984, however, ATTIS reduced its workforce and laid off or downgraded the plaintiffs from the first suit (Bache). In response, CWA processed grievances on behalf of the Bache plaintiffs, which ATTIS denied, but did not proceed to arbitration. CWA

states that it made this decision because it determined that the layoffs resulted from economic conditions and thus were contractually permissible.

In August of 1985, ATTIS announced a nationwide elimination of jobs affecting thousands of CWA-represented employees. In response, CWA filed an unfair labor practice charge against ATTIS with the National Labor Relations Board ("NLRB") on October 25, 1985. CWA complained that the 1985 layoffs resulted from divestiture-related reorganization and therefore violated the AMOA. To support its claim, CWA alleged that ATTIS' economic justification for the layoffs was pretextual because ATTIS was assigning overtime work to, and contracting out work of, targeted work groups in many locations. On

January 29, 1986, the NLRB Regional Director rejected CWA's position that the AMOA imposed restrictions on ATTIS' ability to reduce its workforce and dismissed the charge. CWA appealed the adverse ruling to the NLRB, which affirmed the decision on April 21, 1986.

ATTIS laid off the plaintiffs from the second suit (Bankston) in March 1986. No grievances were filed to protest these layoffs, but the Bankston plaintiffs contend that the omission resulted from CWA's refusal to represent them in the grievance process. The Bankston plaintiffs also assert that they have been denied preferential rehiring rights provided by the AMOA. They have not grieved these claims but similarly contend that CWA has refused to represent them in this regard.

[2] On October 30, 1986, the district court entered summary judgment in Bache on the ground that there were no genuine issues of material fact concerning the plaintiffs' claims under section 301 of the LMRA.[1]

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[1]The district court held that section 301 preempted the plaintiffs' state law claims because resolution of them depended on an analysis of a collective bargaining agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S.Ct. 1904, 1916, 85 L.Ed.2d 206 (1985). On appeal, the Bankston plaintiffs challenge this ruling. Specifically, they contend that a Louisiana statute that penalizes employers for breaching term employment contracts should not be preempted because employees covered by labor contracts would thus be deprived of a penal remedy available to other workers in the state. See La. Civ. Code Ann. art. 2749 (West 1952). They argue that while the terms of their employment contracts must be determined according to federal law, their state law claims

Relying on Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1158 (5th Cir. 1985), the court held that to prevail against any of the defendants, the plaintiffs must prove that their discharges violated the labor contract and that the union breached its duty to represent them fairly. The court found that the terms of the applicable collective bargaining agreement and the

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should still exist once a breach of contract is established. We find this argument meritless because the analysis suggested by the Bankston plaintiffs is unsupported by law.

In the recent case of International Brotherhood of Electrical Workers v. Hechler, --- U.S. ---, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987), the Supreme Court restated the holding of its earlier decision in Allis-Chalmers: "The rule there set forth is that, when a state-law claim is substantially dependent on analysis of a

AMOA permitted ATTIS to layoff and downgrade transferred employees and that, therefore, there was no breach of contract as a matter of law. The court also found that the plaintiffs offered no evidence that CWA acted in bad faith, with malice, or in a discriminatory manner when it determined that arbitration was unwarranted and thus they failed to demonstrate unfair

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collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of § 301 of the LMRA by casting the suit as a state-law claim." Id. 107 S.Ct. at 2166 n. 3. The Court further explained that the rule extends beyond breach of contract suits to encompass other employment claims of union-represented employees unless state laws "proscribe conduct, or establish rights and obligations, independent of labor contract." Id. (quoting Allis-Chalmers, 471 U.S. at 212, 105 S.Ct. at 1912). The Court has not

representation. Accordingly, the court held that the plaintiffs were bound by the results of the grievance proceedings. In Bankston, the district court granted summary judgment on the basis of its previous decision in Bache.

II.

On appeal, the plaintiffs contend that summary judgment was improper

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indicated, however, that an employee's contractual claim may be divided into federal and state components in order to preserve a remedy unavailable under section 301. To the contrary, federal law is "paramount in the area covered by § 301." Id. 107 S.Ct. at 2165 (quoting Teamsters v. Lucas Flour Co., 369 U.S. 95, 103, 82 S.Ct. 571, 576-77, 7 L.Ed.2d 593 (1962)).

To the extent that the plaintiffs assert that the AMOA is separable from the collective bargaining agreement and thus that their AMOA-based claims do not

because factual disputes exist concerning (1) whether the AMOA guaranteed them seven years of employment, (2) whether the law required them to exhaust contractual remedies under the circumstances, and (3) if so, whether CWA's conduct excused their failure to complete the grievance process. The plaintiffs forcefully

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require interpretation of the agreement itself, their argument is foreclosed by our decision in Eitmann v. New Orleans Pub. Serv., Inc., 730 F.2d 359, 362-63 (5th Cir. 1984). In Eitmann, we held that section 301 preempted the state-law contractual claim of an individual employment contract that limited or conditioned the terms of the collective agreeement. Here, the plaintiffs contend that the employer lost its right under the collective bargaining agreement to layoff transferred employees by the terms of the AMOA or, alternatively, under promissory estoppel principles. Clearly then, the

argue that facially inconsistent provisions of the AMOE-for example one section stating that "no transferred employee shall be deprived of his or her employment" for a seven-year period following transfer and another providing that transferred employees laid off during the seven-year period have preferential rights of rehire-rendered the contract ambiguous and that

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plaintiffs seek to assert a contract that limits or conditions the terms of the collective agreement, and federal law must govern their claims. Furthermore, to the extent that the Bankston plaintiffs urge us, on oral argument, to consider an additional theory -- that they alleged a state-tort action that should not be preempted -- we believe the result is unchanged because Allis-Chalmers and Hechler are controlling. Claims of wrongful termination based on fraudulent or other tortious conduct by the employers and

extrinsic evidence they presented in response to the defendants' summary judgment motions created factual issues of contractual interpretation. They also urge us to consider whether an employer and union who make affirmative representations to employees concerning the contract's meaning should be estopped from later asserting another

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union would still involve

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, [and] must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as

interpretation. We conclude, however, that we need not reach these issues because of the plaintiffs' failure to establish an essential element of their claims-that the union breached its duty of fair representation-is dispositive of this appeal.

Under the Federal Rules of Civil Procedure, summary judgment is proper if, when viewing the evidence most favorably to the nonmoving party, "the pleadings [and other documentary evidence on file] show that there is no

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claims for tortious breach of contract.

Allis Chalmers, 471 U.S. at 211, 105 S.Ct. at 1911. See Mason v. Continental Group, Inc., 763 F.2d 1219, 1224 (11th Cir. 1985); Redmond v. Dresser Indus., Inc., 734 F.2d 633, 635 (11th Cir. 1984).

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). See Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984). In reviewing a summary judgment, we apply the same standard that governs the district court's determination. Russell, 736 F.2d at 287. Recent Supreme Court pronouncements also guide our inquiry:

> In or view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situtation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Thus to determine which factual issues are material, we must first examine the substantive law that governs the case, and to determine if an issue of material fact is genuine, we must then decide whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[3.4] Section 301 of the LMRA provides an individual employee with a federal cause of action against his employer for breach of a collective bargaining agreement. Smith v. Evening News Assoc., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); see 29 U.S.C.

§185(a). An employee's cause of action against the union for breach of the duty of fair representation is implied from the statutory scheme of federal labor law. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Because of the intricate relationship between the duty of fair representation and the enforcement of a collectively bargained contract, the two causes of action have become "inextricably interdependent" and known as a "hybrid §301/fair representation" suit. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983).

The interpendence arises from the nature of the collective bargaining agreement. If the arbitration and

grievance procedure is the exclusive and final remedy for breach of the collective bargaining agreement, the employee may not sue his employer under §301 until he has exhausted the procedure. Further, he is bound by the procedure's result unless he proves the union breached its duty of fair representations.

Daigle v. Gulf State Util. Co., 794 F.2d 974, 977 (5th Cir. 1986) (citations omitted). The general rule of exhaustion is inapplicable, however, "if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy" for the breach of contract claims at issue. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58, 85 S.Ct. 614, 619 13 L.Ed.2d 580 (1965);

see Daigle, 794 F.2d at 977. Moreover, the Supreme Court has recognized other exceptions. See e.g., Vaca, 386 U.S at 185, 87 S.Ct. at 914. We have summarized them as follows:

> No exhaustion is necessary if: (1) the union wrongfully refuses to process the employee's grievance, thus violating its duty of fair representation; (2) the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract; or (3) exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group "which is in large part chosen by the [employer and union] against whom [his] real complaint is made."

Rabalais v. Dresser Indus., Inc., 566 F.2d 518, 519 (5th Cir. 1978) (citations omitted).

[5] In this case, it is undisputed that the collective bargaining agreement governing the plaintiff's employment contained mandatory grievance and

arbitration procedures and that none of the plaintiffs exhausted this contractual remedy. However, the plaintiffs contend that three of the above exceptions relieve them of the exhaustion requirement.[2] First, the plaintiffs argue that the collective bargaining agreement's grievance and arbitration procedures do

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[2]The Bankston plaintiffs also assert that the fourth exception-lack of an impartial decision-maker-is applicable. They do not explain, however, how this exception applies to their case. Presumably, their argument is that the union's alleged participation in misrepresenting the terms of the AMOA tainted the contract's remedial procedures, which allowed the union and employer to jointly select an arbitrator. Because we consider the allegations of union misconduct below in discussing the breach-of-duty exception, we need not address this argument separately.

not apply to disputes concerning the AMOA. They premise their argument on an assertion that the AMOA is itself a collectively bargained agreement that contains no remedial provisions. We find this argument specious because the collective bargaining agreement specifically provided for partial amendments and supplemental agreements by mutual consent and, more importantly, the arbitration provisions covered disputes "regarding the true intent and meaning of any provisions of this or any other agreement between the parties." Agreement between Communication Workers of America and South Central Bell Telephone Company effective August 7, 1983, article 23.01(3) (emphasis added). Moreover, the Bache plaintiffs utilized the grievance procedures to

remedy their AMOA-related claims, and there is no indication that ATTIS denied the grievances or that CWA decided not to seek arbitration because the procedures were inapplicable.

[6] The fact that ATTIS actually processed the Bache plaintiffs' grievances also undermines the second argument-that ATTIS repudiated the contract's remedial procedures. The plaintiffs point to evidence that in an unrelated arbitration proceeding in October 1985, a representative of ATTIS stated that disputes arising under the AMOA were not subject to resolution through grievance and arbitration procedures because the AMOA did not so provide. This, they argue, constituted a repudiation by ATTIS. We disagree. We have previously stated: "An employer

can obviously take a stance contrary to that of the employee during the grievance process without being deemed to have repudiated that process." Rabalais, 566 F.2d at 520.

[7,8] As we explained above, the remaining exception-a breach of the union's duty of fair representation-both excuses a failure to exhaust the contractual remedies and removes the bar of the finality provisions of the contract. See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567, 96 S.Ct. 1048, 1057-58, 47 L.Ed.2d 231 (1976). Thus viewed either way, a breach of CWA's duty of fair representation is an essential element of the plaintiffs' case. The plaintiffs contend that they presented sufficient evidence of CWA's bad faith and

arbitrary and discriminatory conduct to create a factual dispute concerning this element and therefore preclude summary judgment. After carefully reviewing the record in each case, we cannot agree.

Because the collective bargaining system "of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," the duty of fair representation stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca, 386 U.S. at 182, 87 S.Ct. at 912. The doctrine imposses an obligation on the exclusive bargaining representative "to serve the interests of all members [of a designated bargaining unit] without

hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Id. at 177, 87 S.Ct. at 910. We recently observed:

> The standards for determining what constitutes the union's duty of fair representation have not yet been fully defined, but that duty clearly includes the obligation to enforce collective bargaining agreements and to prosecute members' grievances arising under them nonarbitrarily and in good faith... [However,] fair representation does not require a union to carry every grievance to arbitration, for the union is given substantial discretion to decide whether and how far a grievance should be pursued.

Hammons v. Adams, 783 F.2d 597, 601 (5th Cir. 1986) (citations omitted). In Hammons, we held that the legal duty to process a grievance "rests on the union, which must prosecute a grievance or refuse for adequate reason to do so." Id. at 602. We did not there decide

what would constitute an adequate reason but merely stated that the union had the duty to prosecute the employees' grievances "with reasonable diligence unless it decided in good faith that the grievances lacked merit or for some other reason should not be pursued." Id.

In this case, the plaintiffs contend that the totality of the evidence shows a pattern of conduct by CWA that raises an inference of bad faith. In particular, they assert that CWA participated in, or failed to prevent their employers from, misrepresenting the AMOA's meaning and fraudulently inducing their transfers. The Bache plaintiffs also argue that their layoffs alerted CWA to a difference in ATTIS' interpretation of the AMOA but that CWA refused to pursue arbitration of their

grievances or to take any action to resolve the problem until 1985 when it filed the NBRB complaint. Furthermore, the Bache plaintiffs allege that instead of arbitrating their claims, CWA's attorney counselled them to file a state court action. In support, they produced a copy of a letter from an attorney advising them to seek counsel for filing a suit. This evidence, they argue, shows both that CWA arbitrarily abandoned their cause and that CWA discriminated against them. The Bankston plaintiffs argue that their affidavits stating that CWA ignored their requests to file grievances on their behalf shows CWA's arbitrary and discriminatory conduct.

CWA denies, however, that it represented to employees that the AMOA

provided an absolute guarantee of employment for seven years following transfer. CWA maintains that it understood the AMOA to prohibit divestiture-related layoffs but to permit terminations for economic and disciplinary reasons and that its communications to local unions and employees were consistent with its interpretation. Furthermore, CWA explains its responses to the plaintiffs' grievances: first, it determined that economic factors motivated the 1984 layoffs, and second, it decided for tactical reasons to remedy the substantial number of divestiture-related layoffs that began in 1985 through NLRB action rather than the grievance process. An affidavit by

CWA Vice President Robert Allen details the union's investigative activities concerning the layoffs and its decision to institute NLRB proceedings. CWA also points out that the plaintiffs' evidence failed to connect the national union to the alleged misrepresentations that the attorney who advised the Bache plaintiffs concerning a judicial remedy for their claims represented the local union, not CWA.[3]

CWA's arguments are well-founded.

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[3]Common-law agency principles govern the determination of whether a national union may be legally responsible for the unilateral actions of local unions or their agents. See Carbon Fuel Co. v. United Mine Workers, 444 U.S.212, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979).

The only evidence offered by the plaintiffs to support the allegations of misrepresentation by CWA was (1) a two-page letter by Executive Vice President John Carroll informing local presidents of the AMOA, to which he attached the full text of the agreement, and (2) a CWA newsletter outlining the terms of the AMOA, which specifically states, "it insures that the Bell System workers we represent won't suffer loss of wages ... as a result of reorganization," and referred to the possibility of layoffs during the seven-year period. Instead, the plaintiffs rely on evidence that workers throughout the nation believed that a seven-year guarantee of employment existed to create an inference of

national union involvment. In view of the plaintiffs' allegations that SCB and ATTIS were actively making the misrepresentations and falsely inducing the transfers, we do not believe that such an inference arises, and without any evidence that CWA knew of the misrepresentations at the time they were allegedly made, we fail to see how CWA's duty of fair representation encompasses a duty to prevent them.

Because the plaintiffs made an insufficient showing of CWA's bad faith based on its alleged participation in misrepresenting the employment guarantee, we are left with claims that CWA arbitrarily refused to pursue meritorious grievances. However, "a breach of the duty of fair representation is not established merely

by proof that the underlying grievance was meritorious." Vaca, 386 U.S. at 195, 87 S.Ct. at 919. A union breaches its duty when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory manner. Id. at 191, 87 S.Ct. at 917. The Bache plaintiffs offered no evidence that CWA failed to adequately invetigate their grievances before deciding that arbitration was unwarranted. Rather, the Bache plaintiffs' position is essentially that CWA had a duty to pursue arbitration based on their interpretation of the contract--that it absolutely guaranteed their employment for seven years.

[9] In our view, however, the union's authority as a collective bargaining representative necessarily empowers it to act according to its own

reasonable interpretation of the labor contract. Federal labor law promotes arbitration and private dispute resolution because they are extensions of the bargaining process: "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960). To require the union to advocate an individual employee's view of the labor contract under the guise of "fair representation" would undermine the union's role as the representative of the collective interest. The Supreme Court has stated the standard by which courts must measure a union's conduct,

both during the bargaining process and the adjustment of grievances: "'A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.'" Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 372, 11 L.Ed. 2d 370 (1964) (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953)).

In Turner v. Air Transport Dispatchers' Assoc., 468 F.2d 297 (5th Cir. 1972), we affirmed a summary judgment against an employee who alleged that the union breached its duty of fair representation because it refused to process a grievance which was contrary to its interpretation of the collective

bargaining agreement. We concluded that the union fulfilled its duty by listening to the employee's arguments at an open meeting and informing him of the union's position: "Further union investigation was unnecessary since the only difference between [the employee], on one side, and [the employer and union], on the other, concerned the interpretation of the collective bargaining agreement, and not a dispute over facts." Id. at 300. In Turner, however, the court observed that the union's interpretation "was the only plausible one under the explicit language of the collective bargaining agreement," id, and thus the reasonableness of the union's conduct did not hinge on the merits of its interpretation. One could argue that if

a contract is ambiguous and an employee's interpretation is a reasonable one, the circumstances are distinguishable. Prior decisions of this court provide a response to that argument.

In Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976), we held that the relevant question in deciding a similar fair representation issue was not whether the union's interpretation was correct but whether it was nonarbitrary. We stated: 'The essence of this action lies not in the [employee's] interpretation deemed reasonable by the district court, but in the reasonableness of the [union's]] interpretation." Id. at 957. In Tedford, an employee took a leave of absence based on one interpretation of a

contractual clause, and the union, which changed its position during his absence, refused, based on its subsequent interpretation, to arbitrate the employee's grievance seeking reinstatement. We rejected the district court's finding that "'a reversal of interprettion or custom which is to have retroactive effect amounts in itself to arbitrary conduct,'" stating that "[i]f the foregoing rule is sustained, the duty of fair representation will be extended so as to protect the interest of the individual employee without regard to the group interests." Id. at 956. Instead, we defined the arbitrariness standard by reference to "relevant, permissible union factors," rationality of result, and "fair and impartial consideration of the interests

of all employees." Id. at 957. Applying this standard, we concluded that neither the union's interpretation nor the decision to apply it retroactively breached the duty of fair representation.

We considered a similar issue in Sanderson v. Ford Motor Co., 483 F.2d 102 (5th Cir. 1973). In Sanderson, a union and employer resolved conflicting contractual provisions concerning seniority, and the union subsequently refused to process the grievances of an employee who was adversely affected by the agreed interpretation. We rejected the proposition that the union breached its duty of fair representation by agreeing to a sesttlement that clearly contravened a provision of the collective bargaining agreement.

Instead, we observed that the terms of a collective agreement consist of not only its written provisions but oral and written amendments, the conduct of the parties, the industrial common law, and the results of the interpretive process. We held that "the district court could not properly conclude as a matter of law that the settlement agreed to by the Union clearly exceeded the bounds of fair interpretation of the collective contract." Id. at 113. Accordingly, we remanded the case for a trial of the fair representation issue, which involved allegations that the union fraudulently induced the employee to consent to a settlement agreement.

[10,11] From these cases, we conclude that a union does not breach its duty of fair representation by

rejecting an employee's interpretation of the collective bargaining agreement unless the union's interpretation is itself arbitrary or unreasonable. In this case, we cannot say that CWA's interpretation of the AMOA was "clearly beyond the bounds of reasonable interpretation." Id. at 112. Nor do the plaintiffs assert that CWA's interpretation was unrelated to the interests of all represented employees or based on impermissible factors, such as "personal animosity or political favoritism." Tedford, 533 F.2d at 957. In short, CWA's decision not to invoke arbitration after evaluating the merits of the Bache plaintiffs' grievances acording to its interpretation of the AMOA constituted a permissible exercise of its discretion. Thus absent evidence

that CWA arbitrarily abandoned their grievances, the Bache plaintiffs failed to raise a factual dispute concerning the breach of CWA's duty of fair representation.[4]

[12] Similarly, the Bankston plaintiffs offered insufficient evidence to show that CWA arbitrarily refused to process their grievances. CWA decided to seek relief from the LNRB concerning

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[4]Although the Bache plaintiffs also argue that CWA discriminated against them by responding to later layoffs differently, they did not substantiate these allegations. The groups of employees whose grievances CWA treated differently were laid off at different times and under different conditions and the plaintiffs made no attempt to show that the groups were similarly situated.

the scheduled layoffs that ATTIS announced in 1985, and its complaint to the NLRB included the same allegations that the plaintiffs sought to assert. At the time that the Bankston plaintiffs' grievances arose, the NLRB Regional Director had already rejected CWA's interpretation of the AMOA, and unless CWA pursued a remedy in that forum, arbitration of similar grievances appeared futile. We held in Stanley v. General Foods Corp., 508 F.2d 274, 275 (5th Cir. 1975), that a union did not breach its duty of fair representation by failing to pursue a grievance that challenged a factory rule after that rule was upheld in another case. In other words, a union's assessment of the merits of a grievance may include a determination of whether the underlying

theory continues to be valid.

In essence, the Bankston plaintiffs assert that choosing the NLRB remedial process rather than the contractual one was itself arbitrary. In Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362, 1369 (9th Cir. 1981), the Ninth Circuit held that a union did not breach its duty of fair representation by seeking relief from the NLRB rather than through arbitration under the circumstances of that case. In Kaylor, the union made a tactical decision to resort to the NLRB because its attorney believed that the legal theory involved was more likely to succeed before the NLRB than a grievance committee. The court affirmed a summary judgment for the union because "uncontroverted facts show this decision to be a reasonable one." Id. In this

case, the plaintiffs offered no evidence to show that CWA's decision was unreasonable.

Concerning their preferential rehiring claims, the Bankston plaintiffs failed to produce evidence, except by vague affidavits with identical, conclusory statements, that they have presented these grievances to CWA seeking its representation. The affidaivts stated simply "that CWA refuses to entertain, file and/or recognize and CWA refuses to proceed with any grievance procedures against defendants in regard [to re-employment rights]." CWA denied this allegation, and under Celotex, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits ... designate 'specific facts.'" 106 S.Ct.

2553. Of course, the Court in Celotex cautioned that the nonmoving party must have adequate time for discovery, but the Court also stated that problems with premature motions could "be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued." Id. at 2554-55. Under Rule 56(f), a party opposing the motion may show by affidavit "that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R.Civ.P. 56(f). The Bankston plaintiffs submitted no Rule 56(f) affidavits, and we cannot see how lack of discovery prevented them from stating in their filed affidavits specific facts to support their allegations, such as a

date that they informed CWA of their grievances. Thus we conclude that the plaintiffs made an insufficient showing of CWA's arbitrariness to preclude summary judgment on this issue.

III.

For the above reasons, the judgment is AFFIRMED.

APPENDIX B

ROBERT A. BACHE, JR., ET AL,
Plaintiffs-Appellants

VERSUS

AMERICAN TELEPHONE AND
TELEGRAPH, ETC., ET AL,
Defendants-Appellees

No. 87-3007.

Appeal from the
United States Court of Appeals,
Fifth Circuit.

May 11, 1988.

ON PETITION FOR REHEARING

Before KING and DAVIS, Circuit Judges, and FELDMAN*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN KING
United States Circuit Judge

* District Judge for the Eastern District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

OCTOBER 30, 1986

ROBERT A. BACHE, JR., ET AL — CIVIL ACTION

VERSUS — NO. 85-5435

AMERICAN TELEPHONE AND TELEGRAPH, ETC., ET AL — SECTION "H"

ORDER AND REASONS

Before the court are a motion for summary judgment filed on behalf of defendants American Telephone and Telegraph Company, AT&T Information Systems, Inc., AT&T Communications, Inc., and AT&T Technologies, Inc.; a motion for summary judgment filed on behalf of defendant South Central Bell: and a "memorandum in support of motions for summary judgment" filed on behalf of defendant The Communication Workers of America, which we treat as a motion for summary judgment by said defendant. For the following reasons, the motions are GRANTED.

THE AT&T DEFENDANTS

STATE LAW CLAIM - PREEMPTION

Plaintiffs state law claims for fraud, breach of contract and misrepresentation center on their employment relationship with American Telephone and Telegraph Company (AT&T) and its affiliates. These allegations arise out of the alleged wrongful termination of employment and fall within the central concern of federal labor law.[1] It is well settled that states may regulate conduct which is only of peripheral concern to federal law, such as slander, or which touches interests deeply

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[1] "Wrongful termination of employment is grist for the arbitration mill in collective bargaining agreements." Mason v. Continental Group, Inc., 763 F.2d 1219, 1224 (11th Cir. 1985).

rooted in local feeling and responsibility, such as strike violence. Gray v. Local 714, 778 F.2d 1087 (5th Cir. 1985). Where, as here, employees who are covered by a collective bargaining agreement seek to redress a grievance subject to its terms, their avenue is the procedure provided by the collective bargaining agreement. Therefore, a state law cause of action is necessarily preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185. Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359 (5th Cir.), cert. denied, 105 S.Ct. 433, L.Ed.2d 359 (1984).

The U. S. Supreme Court recently decided that a Wisconsin tort action for bad faith handling of an insurance claim was preempted by §301. The controversy involved a disability policy incorporated

by reference into a collective bargaining agreement. The Court held that the state law claim was preempted because the resolution of the issues depended upon an analysis of the collective bargaining agreement.

> If the policies that animate §301 are to be given their proper range, however, the pre-emptive effect of §301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." Bowen v. United States Postal Service, 459 U.S. 212, 224-225, 103 S.Ct. 588, 596, 74 L.Ed.2d 402 (1983). The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such

> questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by re-labeling their contract claims as claims for tortious breach of contract.

Allis-Chalmers Corporation v. Lueck, 105 S.Ct. 1904, at 1911 (1985).

As in Allis-Chalmers, the resolution of the state law claims in this case are substantially dependent upon an analysis of the terms of a collective bargaining agreement, the Amended Memorandum of Agreement and the 1983-1986 labor contract entered into between Communication Workers of America and South Central Bell Telephone Company. The fact that the state cause of action is of general applicability does not exempt the claims from the preemption doctrine. It is of no consequence that a state has acted through laws of broad

application rather than through laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow states to control conduct which is the subject of national regulation would create potential frustration of national purpose. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 79 S.Ct. 773, 779 (1959). Under these circumstances, applying state law would interfere with federal regulation of labor disputes. See also Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 300, 97 S.Ct. 1056, 1063 (1977).

§301 CLAIM

In order to succeed on a §301 claim plaintiffs must prove that there was breach

of contract and that the union breached its duty of fair representation.

> Section 301 of the Labor Management Relations Act provides for federal suits for violations of collective bargaining agreements. Before the employee may sue, however, he must exhaust the grievance remedies provided in the collective bargaining agreement. Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 96 S.Ct. 1048, 1055-56, 47 L.Ed.2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967). The employee is bound by the results of the grievance proceedings, according to the finality provisions of the typical collective bargaining contract[5], unless the union has breached its statutory duty of fair representation in processing the grievance. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 2290, 76 L.Ed.2d (1983); Hines, 96 S.Ct. at 1057-59.
>
> Therefore, judicial review of dispute settlement pursuant to a collective bargaining agreement necessarily involves two interdependent claims: "To prevail against either the company or the Union, [the employees] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." Hines, 96 S.Ct. at 1059.

Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, at 1158 (5th Cir. 1985).

We conclude that there is no genuine issue of material fact as to either of the two "interdependent claims," and that movers are entitled to judgment therein as a matter of law.

A) BREACH OF CONTRACT

Plaintiffs contend that Paragraph 2 of the Amended Memorandum of Agreement protected them against layoff or termination for a period of seven years after they transferred to ATTIS. However, the provisions of the AMOA, taken as a whole, refute this claim. Paragraph 2 of the AMOA begins with "Except as otherwise provided for in this agreement..." Paragraph 10 of the AMOA states:

> Nothing in this agreement shall be construed as restricting, limiting, or otherwise affecting the authority of any Bell System company or new subsidiary or affiliate entity or AT&T organization to layoff or discharge an employee, or take any other disciplinary action affecting an employee for cause or any other applicable standard established in an applicable collective bargaining agreement.

Furthermore, there are other clauses in the AMOA which contemplate and provide for the possibility of downgrading and/or laying off transferred employees. Similarly, Article 7 of the 1983-1986 labor contract between the Communication Workers of America and South Central Bell Telephone Company, which plaintiff's concede covered their employment after they transferred to ATTIS, provides that the company has the right to layoff employees. Because the contracts in question give ATTIS the right to layoff and downgrade transferring

employees, there was no breach of contract.

2) BREACH OF FAIR REPRESENTATION

A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith. Furthermore, an employee does not have an absolute right to have his grievance taken to arbitration. Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 916-917 (1967). In its role as the exclusive agent for all employees in the bargaining unit the union has the power to sift out frivolous grievances, to abandon processing of grievances which it determines in good faith to be meritless, and to settle disputes with the employer short of arbitration. Harris v. Chemical Leaman

Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971).

Plaintiffs have offered no evidence that the CWA acted in bad faith, with malice, or in a discriminatory manner when it concluded that arbitration was not warranted in this case. Indeed, in depositions several plaintiffs specifically deny any malice on the part of the union. Plaintiffs have failed to demonstrate that the CWA has failed to represent them fairly in the handling of their grievances. Absent this, plaintiffs are bound by the results of the grievance proceeding. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 2290, 76 L.Ed.2d 476 (1983). Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 1057-59 (1976).

DEFENDANT SOUTH CENTRAL BELL

Defendant South Central Bell's motion for summary judgment is also GRANTED. None of the plaintiffs, except for plaintiff McCrudden filed any grievance against defendant South Central Bell in connection with their transfer to ATTIS. Before initiating judicial proceedings relative to a collective bargaining agreement, a plaintiff first must have sought to exhaust the available administrative remedies under the agreement. See Vaca v. Sipes, supra; Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). Since plaintiffs did not utilize the dispute mechanism of the collective bargaining agreement regarding their claims against South Central Bell, their suit against Bell must be dismissed. As for

plaintiff McCrudden, although he did file a grievance against defendant South Central Bell, he offers no evidence to indicate that the CWA breached its duty of fair representation in deciding not to process McCrudden's grievance to arbitration. Accordingly, South Central Bell's motion for summary judgment is GRANTED.

October 30, 1986

s/J. Duplantier
UNITED STATES
DISTRICT JUDGE

OCTOBER 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT A. BACHE, JR., SANDRA H. BUSH, JOSEPH D. CLAY, JULES B. CLELAND, ANTHONY L. ICAMINA, SR., RONALD J. JOACHIM, EARL C. LANCASHIRE, MICHAEL R. LANNES, JAUNICE J. MATTHEWS, ROBERT E. MCCRUDDEN, LARRY L. MENNESSES, JAMES G. MILLIKEN, PATRICK O. O'DONNELL, ERNEST M. PERKINS, MORRIS J. REESON, CHARLES M. THOMAS, FRANK VIDAL — CIVIL ACTION

VERSUS — NO. 85-5435

AMERICAN TELEPHONE AND TELEGRAPH, FOR ITSELF AND ON BEHALF OF THE BELL SYSTEM COMPANIES, AMERICAN TELEPHONE AND TELEGRAPH INFORMATION SERVICES, SOUTH CENTRAL BELL TELEPHONE COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMMUNICATIONS, INC., AMERICAN TELEPHONE AND TELEGRAPH TECHNOLOGIES, INC., THE COMMUNICATION WORKERS OF AMERICA — SECTION "H"

J U D G M E N T

Considering the court's Order and Reasons dated October 30, 1986 filed herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of

defendants, American Telephone and Telegraph, for itself and on behalf of the Bell System Companies, American Telephone and Telegraph Information Services, South Central Bell Telephone Company, American Telephone and Telegraph Communications, Inc., American Telephone and Telegraph Technologies, Inc., and The Communication Workers of America, and against plaintiffs, Robert A. Bache, Jr., Sandra H. Bush, Joseph D. Clay, Jules B. Cleland, Anthony L. Icamina, Sr., Ronald J. Joachim, Earl C. Lancashire, Michael R. Lannes, Jaunice J. Matthews, Robert E. McCrudden, Larry L. Mennesses, James G. Milliken, Patrick O. O'Donnell, Ernest M. Perkins, Morris J. Reeson, Charles M. Thomas, and Frank Vidal, dismissing plaintiffs' suit at their costs.

DATE OF ENTRY OCTOBER 30, 1986

New Orleans, Louisiana, this 30th day of October, 1986.

s/J. Duplantier
UNITED STATES DISTRICT JUDGE

(2) (2)

NO. 88-246/87-2067

Supreme Court, U.S.
FILED
SEP 7 1988
JOSEPH E. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-246

ROBERT A. BACHE, JR., ET AL
Petitioners

VERSUS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AT&T INFORMATION SYSTEMS, INC., SOUTH CENTRAL BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS, INC. AND THE COMMUNICATION WORKERS OF AMERICA
Defendants

NO. 87-2067

JO B. BANKSTON, ET AL
Petitioners

VERSUS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL
Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WAYNE T. McGAW
COUNSEL OF RECORD
SOUTH CENTRAL BELL
TELEPHONE COMPANY
365 Canal Street, Room 1870
New Orleans, LA 70140
Telephone: (504) 528-2058
ATTORNEY FOR RESPONDENT

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the appellate court correctly affirmed the granting of South Central Bell's summary judgment motions in *Bache* and *Bankston*, when petitioners improperly instituted judicial proceedings before exhausting available administrative remedies.

2. Whether the District Court's grant of summary judgment was proper when petitioners failed to assume the burden of proof necessary to preclude such grant by showing the existence of genuine issues of material fact.

LIST OF PARTIES

In accordance with Supreme Court Rule 21.1 (b), petitioners submit the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are, to-wit:

A. *List of Bache Petitioners*

1. Robert A. Bache, Jr.
2. Sandra H. Bush
3. Joseph D. Clay
4. Jules B. Cleland
5. Anthony L. Icamina, Sr.
6. Ronald J. Joachim
7. Earl C. Lanashire
8. Michael R. Lannes
9. Jaunice J. Matthews
10. Robert E. McCrudden
11. Larry L. Mennesses
12. James G. Milliken
13. Patrick O. O'Donnell
14. Ernest M. Perkins
15. Morris J. Reeson
16. Charles M. Thomas
17. Frank Vidal

B. *List of Bache Defendants*

18. American Telephone & Telegraph Company
19. AT&T Information Systems, Inc.
20. South Central Bell Telephone Company
21. AT&T Communications, Inc.
22. The Communication Workers of America

LIST OF PARTIES (continued)

C. *List of Bankston Petitioners*

1. Jo B. Bankston
2. Janet Bemiss
3. Amy B. Brandt
4. Mary Patricia Bush
5. Linda Butler
6. Bonnie B. Carrere
7. Wayne P. Catalano
8. Eileen Durel
9. Rochell Fugere
10. Iris Gueno
11. Joyce Gundermann
12. Raymond Lesene
13. Barbara Marto
14. Jeanne Piotrowski
15. Liesel Reuther
16. Sally Sensebe
17. Shirley Weaver

D. *List of Bankston Defendants*

18. American Telephone & Telegraph Company
19. AT&T Information Systems, Inc.
20. South Central Bell Telephone Company
21. AT&T Communications, Inc.
22. The Communication Workers of America

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NO. 87-2067 and NO. 88-246

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, South Central Bell Telephone Company, respectfully prays for denial of the writs of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered March 23, 1988 and May 11, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 840 F.2d 283 (Petitioners' Appendices A). The *Bache* petitioners' Petition for Rehearing was denied on May 11, 1988. (Petitioners' Appendices B). The opinion of the District Court for the Eastern District of Louisiana is not reported. (Petitioners' Appendices C).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioners brought these parallel proceedings to contest layoffs which their employer, American Telephone and Telegraph Information Systems ("ATTIS") was forced to institute due to poor economic conditions. Petitioners'

employment in ATTIS, in both the *Bache* and the *Bankston* suits, became effective on January 1, 1984, when they voluntarily transferred from South Central Bell Telephone Company ("South Central Bell") to ATTIS, subsequent to the American Telephone and Telegraph ("AT&T") divestiture. The *Bache* suit was filed on October 25, 1985, by ATTIS employees who were laid off between October 31, 1984 and December 15, 1984; the *Bankston* suit was filed on February 7, 1987 by ATTIS employees who were laid off in March, 1986.

Originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, against the same defendants, both cases were removed to the United States District Court for the Eastern District of Louisiana, basing jurisdiction on Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. On October 30, 1986, the district court entered summary judgment for the *Bache* defendants, ruling that the state law claims were preempted by §301 of the LMRA, and that the *Bache* plaintiffs had failed to show evidence supporting the essential elements of a §301 claim, i.e., breach of contract[1] and breach of a duty of fair union representation. The district court's grant of summary judgment in favor of South Central Bell was granted for the additional reason that the *Bache* plaintiffs failed to process grievances against South Central Bell; thus, their administrative remedies had not been exhausted.

---

[1] The contract allegedly breached is the collective bargaining agreement known as the Amended Memorandum of Agreement ("AMOA") which was executed by AT&T and the Communications Workers of America ("CWA"). The contract contained provisions concerning the employment rights of AT&T employees who would transfer to new AT&T subsidiaries or affiliates as a result of the breakup of AT&T. *See, United States vs. American Telephone and Telegraph Co., et al.*, 552 F.Supp. 131 (D.D.C. 1982).

After removal, the *Bankston* court granted summary judgment as to all defendants, basing its judgment on the reasons previously set forth in the *Bache* opinion. By that time, *Bache* was on appeal in the Court of Appeals for the Fifth Circuit. When the *Bankston* appeal was entered, the two cases were consolidated since they were essentially the same suit. The Fifth Circuit affirmed both lower court decisions in its March 23, 1988 judgment. The *Bache* petition for rehearing was denied on May 11, 1988; no rehearing was sought in *Bankston*.

Essentially, *Bache* and *Bankston* are the same suits. Both arose out of the layoff of workers, pursuant to the terms of the same collective bargaining agreement. Both suits contain the same allegations, i.e., breach of contract, fraudulent misrepresentation, and breach of a duty of fair representation. Both cases involve the same defendants, and both cases were heard before the same district court judge, The Honorable Adrian G. Duplantier.

REASONS FOR DENYING THE WRIT

I. *Petitioners' failure to process their grievance precludes judicial proceedings.*

Insofar as it held, in both *Bankston* and *Bache*, that South Central Bell's Motion for Summary Judgment was proper because petitioners prematurely instituted judicial proceedings against this respondent, the Fifth Circuit decision is clearly correct; therefore, there is no reason for further review. This Honorable Court firmly established in *Vaca v. Sipes*, 386 U.S. 171 (1967), that a plaintiff must first seek to exhaust his administrative remedies before bringing judicial proceedings pursuant to a collective bargaining agreement. *See also, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

In *Bache,* only one petitioner filed a grievance with the union against South Central Bell (Petitioners' Appendices C, page 13). No other *Bache* petitioner utilized the appropriate dispute mechanism against South Central Bell. The claim of the one petitioner who did file a grievance was dismissed on summary judgment along with the other claims because that petitioner presented no evidence supporting his claim. (Petitioners' Appendices C, page 14).

In *Bankston,* petitioners claim that the union refused to even process their grievances with ATTIS, but they made no claim that they even attempted to file grievances with South Central Bell. Even as to ATTIS, petitioners produced no evidence that they ever presented their grievances to the union for processing (Petitioners' Appendices A, page 54). Neither did petitioners present evidence of an arbitrary or bad faith refusal by the union to process the *Bankston* grievance. (Petitioners' Appendices A, page 51). The *Bankston* court agreed that, by the time the *Bankston* suit was brought, the National Labor Relations Board had already rejected the union's interpretation of the AMOA when it decided the Union's charge filed with the Board. The union was convinced that the layoffs resulted from economic conditions, not divestiture; therefore, the layoffs were contractually permissible and processing another grievance would have been futile. (Petitioners' Appendices A, page 52).

II. *Petitioners' failure to evidentially show the existence of material fact demanded entry of summary judgment in respondents' favor.*

The *Bache* Petitioners urge this court to reconsider the merit of their allegation of breach of a duty of fair union representation, yet petitioners failed, in the proceedings below, to support the charge with evidence. Petitioners'

support for their position was not evidential in nature; instead, it was merely the unilateral assertion that the union failed to represent them according to the terms of the contract as petitioners, alone, interpreted it. (Petitioners' Appendices A, page 42). In considering the issue, the Fifth Circuit quoted *Humphrey v. Moore,* 375 U.S. 335, 349 (1964) (citations omitted), which noted that unions must be afforded a wide range of reasonableness in exercising their discretion (Petitioners' Appendices A, page 44). The *Bache* court, following *Humphrey's* holding, correctly reasoned that "[t]o require the union to advocate an individual employee's view of [a] labor contract under the guise of 'fair representation of the collective interest" (Petitioners' Appendices A, page 43).

As in *Bache,* the *Bankston* petitioners failed to evidentially show the merit of their allegations, but in this appeal, the *Bankston* petitioners defend their failure by blaming the district court. They claim that they were not given sufficient time to conduct discovery. However, if petitioners did perceive this as a problem, they did not seek the appropriate remedy.

Rule 56(f) of the Federal Rules of Civil Procedure prescribes the proper response to a motion for summary judgment when the opposing party needs to conduct discovery. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Applying the *Celotex* principles to this case, the Fifth Circuit concluded:

> [T]he court in *Celotex* cautioned that the nonmoving party must have adequate time for discovery, but the Court also stated that problems with premature motions could "be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on

> the motion to be continued." *Id.* at 2554-55. Under Rule 56(f), a party opposing the motion may show by affidavit "that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R.Civ.P. 56(f). The Bankston plaintiffs submitted no Rule 56(f) affidavits. . . . (Petitioners' Appendices A, page 55).

Although petitioners did file affidavits which were intended to show attempts to file grievances, the Fifth Circuit found them insufficient for their purpose. The court reasoned, "we cannot see how lack of discovery prevented [affiants] from stating in their affidavits specific facts to support their allegations, such as a date that they informed CWA of their grievances." (Petitioners' Appendices A, pages 55-56).

Petitioners now urge this court to accept those affidavits as Rule 56(f) affidavits *(Bankston* petition at page 15). However, the affidavits presented do not state the reasons why petitioners were not able, by affidavit, to justify their opposition to the motion, as Rule 56(f) instructs. The affidavits were never intended to fulfill a Rule 56(f) purpose, and cannot now be so construed.

CONCLUSION

For the foregoing resons, the petitions for writ of certiorari filed by the *Bache* and *Bankston* petitioners should be denied.

WAYNE T. McGAW
365 Canal Street, Roon 1870
New Orleans, LA 70140
Telephone: (504) 528-2058

Supreme Court, U.S.
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NO. 87-2067/88-246

In the
Supreme Court of the United States

OCTOBER TERM, 1988

JO B. BANKSTON, ET AL,
Petitioners
in No. 87-2067

ROBERT A. BACHE, JR., ET AL,
Petitioners
in No. 88-246

v.

AMERICAN TELEPHONE & TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC., SOUTH CENTRAL BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS, INC. AND THE COMMUNICATIONS WORKERS OF AMERICA,
Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC. AND AT&T COMMUNICATIONS, INC. TO PETITIONS FOR WRITS OF CERTIORARI

OF COUNSEL

JOE RAMIREZ
LAWRENCE M. JOSEPH
American Telephone
& Telegraph Co.
One Oak Way
Berkeley Heights, N.J. 07922
Telephone: (201) 771-2174

ROBERT K. McCALLA,
Counsel of Record
KEITH M. PYBURN, JR.
McCalla, Thompson, Pyburn &
Ridley
650 Poydras Street, Suite 2800
New Orleans, Louisiana 70130
Telephone: (504) 524-2499

COUNSEL FOR RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC., and AT&T COMMUNICATIONS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS RESTATED

1. Whether the federal courts may properly grant summary judgment based on the evidence in the record when the party opposing the motion submits numerous affidavits in response to the motion, but, does not, pursuant to Fed. R. Civ. P. 56(f) submit an affidavit setting forth the reasons needed for time to conduct discovery nor produce evidence establishing the existence of a material issue of disputed fact?

2. Whether review of the Fifth Circuit's conclusion that there were no disputed issues of material fact is a proper subject for the exercise of this Court's discretionary jurisdiction?

STATEMENT REQUIRED BY RULE 28.1

AT&T Information Systems, Inc. and AT&T Communications, Inc. are wholly-owned subsidiaries of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co., Ltd.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; Covidea; AT&T Microelectronia de Espana, S.A.; Sun Microsystems, Inc.; Japan Ens, Ltd.; Jamaica Digiport International Limited; Kalex Circuit Board Company, Limited; Lycom A/S; Omnipage Technology Corporation; Rmcop Office Venture; Rosewood Associates; Southpoint Tower Limited Partnership; and Tower Center Associates.

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No. 87-2067 No. 88-246

In The

Supreme Court of the United States

OCTOBER TERM, 1988

JO B. BANKSTON, ET AL,
Petitioners
in No. 87-2067

ROBERT A. BACHE, JR., ET AL,
Petitioners
in No. 88-246

v.

AMERICAN TELEPHONE & TELEGRAPH CO.,
AT&T INFORMATION SYSTEMS, INC.,
SOUTH CENTRAL BELL TELEPHONE COMPANY,
AT&T COMMUNICATIONS, INC. AND
THE COMMUNICATIONS WORKERS OF AMERICA,
Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH CO., AT&T INFORMATION SYSTEMS, INC. AND AT&T COMMUNICATIONS, INC. TO PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

On January 1, 1984, American Telephone and Telegraph Company (AT&T) divested itself of the Bell Operating Companies pursuant to a court order issued in federal antitrust litigation. Before the divestiture, AT&T and the Communications Workers of America (CWA) entered into an Amended Memorandum of Agreement (AMOA) to address the movement of CWA represented employees from the operating companies to new AT&T subsidiaries such as AT&T Information Systems (ATTIS). The CWA interpreted the AMOA, incorrectly in AT&T's view, as protecting transferred employees from "divestiture" related, as opposed to "economic", layoffs.

In the Fall of 1984 ATTIS reduced its workforce and laid off the *Bache* Petitioners. In response, the CWA processed grievances on their behalf and pursued these grievances through all steps of the grievance procedure. However, because CWA concluded the layoff of the *Bache* Petitioners was "economic", the CWA did not pursue the grievances to arbitration. The *Bache* Petitioners thereafter filed suit against ATTIS and CWA under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, claiming their layoffs violated the AMOA and that the CWA had breached its duty of fair representation. The district court, after granting the *Bache* Petitioners time to conduct discovery, granted summary judgment in favor of all defendants.

In August 1985 ATTIS announced a nationwide layoff. The CWA filed an unfair labor practice charge with the National Labor Relations Board complaining the layoffs resulted from divestiture, rather than economic conditions, and therefore violated the AMOA. The NLRB Regional Director, affirmed by the NLRB General Counsel, rejected the CWA's position that the AMOA imposed restrictions on ATTIS' right to reduce its workforce for any reason whether divestiture or economic related.

In March 1986 ATTIS laid off the *Bankston* Petitioners. They contend the CWA should have grieved their layoffs (as it had done in the *Bache* layoffs). By this time, however, the NLRB Regional Director had already rejected the contractual theory upon which their grievances would have depended, i.e., that the AMOA protected employees from layoff for any reason. Thus, the CWA reasonably did not replicate its prior challenges to the ATTIS layoffs. The *Bankston* Petitioners filed suit alleging their layoffs violated the AMOA. The district court granted the defendants' summary judgment motions "for the same reasons

set forth in *Bache.*" (Appendix to Bankston Petition at B-3).

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review the complete factual record to determine whether the district court correctly decided there were no disputed material facts. The district court's decisions on this issue have already been reviewed and affirmed by the Fifth Circuit. It is not the function of this Court to review these essentially factual conclusions, *cf. Branti v. Finkel*, 445 U.S. 507, 512 n. 6, 100 S.Ct. 1287, 1291, 63 L.Ed.2d 574 (1980), and there are no exceptional circumstances present to justify review.

The *Bankston* Petitioners argue the lower courts departed from the "accepted and usual course of judicial procedure" by not granting them sufficient opportunity to conduct discovery prior to the court's consideration of summary judgment. Federal Rule 56(f) prescribes the proper method and standard for identifying a request for discovery in response to a motion for summary judgment. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Fifth Circuit properly applied this Court's precedent in rejecting Petitioners' argument:

> Of course, the Court in *Celotex* cautioned that the nonmoving party must have adequate time for discovery, but the Court also stated that problems with premature motions could "be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued." *Id.* at 2554-55. Under Rule 56(f), a party opposing the motion may show by affidavit "that the party

> cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed.R.Civ.P. 56(f). The Bankston plaintiffs submitted no Rule 56(f) affidavits. . . .

840 F.2d at 292. Contrary to the arguments of the Petitioners[1] the lower courts in this case followed standard procedural rules well within the broad range of discretion available to the courts under the Federal Rules of Civil Procedure.

Petitioners also argue there is a disputed issue of material fact as to whether mandatory grievance and arbitration procedures apply to Petitioners' claim their layoffs violated the AMOA. The Fifth Circuit correctly found this argument to be "specious." 840 F.2d at 288. This determination is unworthy of review.

Finally, Petitioners argue the Fifth Circuit decided a federal question "in a way which conflicts with the decisions of this Court," (*Bankston* Petition at p. 17), by incorrectly applying the doctrine of collateral estoppel. The district court decided *Bankston* on the merits, not by applying collateral estoppel principles. The court simply applied its own reasoning and analysis from the nearly identical *Bache* case. Collateral estoppel was never raised as an issue below and was not applied by the lower courts. Thus, it is not a proper subject for review by this Court. *EEOC v. Federal Labor Relations Board*, 476 U.S. 19, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986).

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[1] There was no order, and undersigned counsel was not present at any conversation where the district court advised counsel for Petitioners that "no extension of time would be granted either to conduct discovery or to assemble a record for appeal." (*Bankston* Petition at 16).

There is no reason for this Court to exercise supervisory jurisdiction over this matter. The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

S/KEITH M. PYBURN JR.

ROBERT K. McCALLA,
KEITH M. PYBURN, JR.
McCalla, Thompson, Pyburn & Ridley
650 Poydras Street, Suite 2800
Poydras Center
New Orleans, Louisiana 70130
Telephone: (504) 524-2499

OF COUNSEL

JOE RAMIREZ
LAWRENCE M. JOSEPH
American Telephone & Telegraph Company
One Oak Way
Berkeley Heights, NJ 07922
Telephone: (201) 771-2174

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Opposition of American Telephone and Telegraph Co., AT&T Information Systems, Inc. and AT&T Communications, Inc. has been served upon all counsel of record by placing a copy of the same in the United States Mail, properly addressed, postage prepaid on this 7th day of September, 1988.

S/KEITH M. PYBURN JR.

KEITH M. PYBURN, JR.

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(4) (4)

Nos. 87-2067 & 88-246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JO B. BANKSTON, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH CO., *et al.*,
Respondents.

ROBERT A. BACHE, *et al.*,
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AMERICAN TELEPHONE & TELEGRAPH CO., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

JOHN QUINN
2000 Southbridge Parkway
Birmingham, Alabama 35209

JAMES B. COPPESS
(Counsel of Record)
1925 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 728-2456

Counsel for Communications Workers of America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1988

Nos. 87-2067 & 88-246

JO B. BANKSTON, *et al.*,
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AMERICAN TELEPHONE & TELEGRAPH CO., *et al.*,
Respondents.

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

STATEMENT OF THE CASE

The proceedings below and the pertinent facts are correctly stated in the opinion by Judge King, *nee* Randall, for the court of appeals:

This is a consolidated appeal of cases brought by former employees of South Central Bell Telephone Company ("SCB") and American Telephone and Telegraph Information Systems, Inc. ("ATTIS"), whose exclusive bargaining representative was Communication Workers of America, AFL-CIO ("CWA"). The suits, originally filed in state court, alleged breaches of contract and fraudulent misrepresentation by the former employers and the labor union in connection with employment layoffs during the fall of 1984 and the spring of 1986. The defendants asserted that section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, governed the claims and removed the cases to the United States District Court for the Eastern District of Louisiana. The district court subsequently granted the defendants' motions for summary judgment, and the plaintiffs timely appealed from the final judgments dismissing their suits.

The relevant facts presented to the district court are as follows. On January 1, 1984, American Telephone and Telegraph Company ("AT & T") divested itself of the Bell Operating Companies, including SCB, pursuant to court order in federal antitrust litigation. *See United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). In preparing a plan of reorganization, AT & T negotiated with labor unions concerning the continued employment of union members, and on March 26, 1982, AT & T and CWA executed an Amended Memorandum of Agreement ("AMOA"). The AMOA provided, among other things, that the collective bargaining agreement in effect at SCB would continue to apply to employees who tranferred from SCB to a new AT & T subsidiary or affiliate. The AMOA also contained provisions concerning the employment rights of transferred employees; these provisions became the subject of later dispute between ATTIS and CWA and established the basis for the present suits.

In the fall of 1983, all of the plaintiffs in these cases were SCB employees with substantial seniority,

and on or about January 1, 1984, all transferred from SCB to ATTIS (then named American Bell Company). The plaintiffs state that they transferred because company and union representatives assured them of job security at ATTIS, because various informational materials represented that the AMOA guaranteed their continued employment for seven years after transfer, and because SCB told them that the type of work they were doing would be performed at ATTIS in the future. During the fall of 1984, however, ATTIS reduced its workforce and laid off or downgraded the plaintiffs from the first suit (*Bache*). In response, CWA processed grievances on behalf of the *Bache* plaintiffs, which ATTIS denied, but did not proceed to arbitration. CWA states that it made this decision because it determined that the layoffs resulted from economic conditions and thus were contractually permissible.

In August of 1985, ATTIS announced a nationwide elimination of jobs affecting thousands of CWA-represented employees. In response, CWA filed an unfair labor practice charge against ATTIS with the National Labor Relations Board ("NLRB") on October 25, 1985. CWA complained that the 1985 layoffs resulted from divestiture-related reorganization and therefore violated the AMOA. To support its claim, CWA alleged that ATTIS' economic justification for the layoffs was pretextual because ATTIS was assigning overtime work to, and contracting out work of, targeted work groups in many locations. On January 29, 1986, the NLRB Regional Director rejected CWA's position that the AMOA imposed restrictions on ATTIS' ability to reduce its workforce and dismissed the charge. CWA appealed the adverse ruling to the NLRB, which affirmed the decision on April 26, 1986.

ATTIS laid off the plaintiffs from the second suit (*Bankston*) in March 1986. No grievances were filed to protest these layoffs, but the *Bankston* plaintiffs contend that this omission resulted from CWA's refusal to represent them in the grievance process.

> The *Bankston* plaintiffs also assert that they have been denied preferential rehiring rights provided by the AMOA. They have not grieved these claims but similarly contend that CWA has refused to represent them in this regard.
>
> On October 30, 1986, the district court entered summary judgment in *Bache* on the ground that there were no genuine issues of material fact concerning the plaintiffs' claims under section 301 of the LMRA. . . . The court found that the terms of the applicable collective bargaining agreement and the AMOA permitted ATTIS to layoff and downgrade transferred employees and that, therefore, there was no breach of contract as a matter of law. The court also found that the plaintiffs offered no evidence that CWA acted in bad faith, with malice, or in a discriminatory manner when it determined that arbitration was unwarranted and thus they failed to demonstrate unfair representation. Accordingly, the court held that the plaintiffs were bound by the results of the grievance proceedings. In *Bankston*, the district court granted summary judgment on the basis of its previous decision in *Bache*. [App. A-11-20 (footnote omitted).] [1]

In affirming the district court's decisions, the court of appeals found it unnecessary to reach the contract claims "because the plaintiffs' failure to establish an essential element of their claims—that the union breached its duty of fair representation—is dispositive of this appeal." App. A-24.

REASONS FOR DENYING THE WRIT

1. The *Bache* plaintiffs acknowledge that CWA explained its decision not to arbitrate their grievance by "stating that it made this decision unilaterally because it determined that the lay-offs resulted from economic conditions which were permissible under the CWA's inter-

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[1] All references are to the Appendix to the petition in *Bankston v. American Telephone & Telegraph Co.*, No. 87-2067.

pretation of the language of the Amended Memorandum of Agreement (AMOA)." *Bache* Pet. 6. Similarly, the *Bankston* plaintiffs state that, in explaining the union's decision not to grieve their layoffs, "CWA informed petitioners that CWA had filed suit with the National Labor Relations Board ("NLRB") against ATTIS and that the Regional Director of the NLRB had determined that the AMOA did not guarantee seven years of employment." *Bankston* Pet. 8.

The courts below found CWA's decisions not to arbitrate the plaintiffs' grievances for these reasons to be a permissible exercise of its authority. With respect to the *Bache* grievance, the court of appeals held:

> CWA's decision not to invoke arbitration after evaluating the merits of the *Bache* plaintiffs' grievances according to its interpretation of the AMOA constituted a permissible exercise of its discretion. [App. A-50.]

Similarly, with respect to the *Bankston* grievance, the court of appeals found:

> CWA decided to seek relief from the NLRB concerning the scheduled layoffs that ATTIS announced in 1985, and its complaint to the NLRB included the same allegations that the plaintiffs sought to assert. At the time that the *Bankston* plaintiffs' grievances arose, the NLRB Regional Director had already rejected CWA's interpretation of the AMOA, and unless CWA pursued a remedy in that forum, arbitration of similar grievances appeared futile. [App. 51-52.]

The plaintiffs do not deny that CWA's decisions rested on the union's evaluation of the merits of their grievances. At most, they hint that alleged earlier misrepresentations by CWA regarding the AMOA's protection of employees may have affected the union's ability to fairly represent them. *Bankston* Pet. 18-19, 21-22. The plain-

tiffs do not develop this point in their petitions, and they studiously avoid describing the alleged misrepresentations. The courts below carefully examined the union's communications regarding the AMOA. The court of appeal's opinion demonstrates that the union not only distributed the full text of the agreement, but expressly "referred to the possibility of layoffs during the seven-year period." App. A-40-41. As the district court pointed out, several provisions of the AMOA itself actually discuss the possibility of layoffs. App. C-9-10. Thus, the plaintiffs have failed to establish any misrepresentation on CWA's part, much less that it affected the union's decision on handling their grievances.

"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Vaca v. Sipes*, 386 U.S. 171, 194 (1967). The plaintiffs do not seriously dispute that CWA did just that in determining their grievances did not warrant arbitration. Since there is no genuine dispute with respect to this issue, the courts below were correct in granting summary judgment for the defendants.

2. The *Bankston* plaintiffs assert that "a motion for summary judgment on the Section 301 breach of contract issue at this point in the proceedings was inappropriate, and should have been delayed until discovery could be conducted." *Bankston* Pet. 25. The *Bankston* plaintiffs' contract claim is "that they were guaranteed seven years of employment." *Id.* at 23. The district court found this claim to be without merit because the AMOA on its face contemplates layoffs. App. C-9-11. Moreover, the plaintiffs' failure to show that the union breached its duty in failing to arbitrate their contract claim is fatal to their attempt to raise it in court. *Vaca v. Sipes*, *supra*, 386 U.S. at 186. The plaintiffs did not respond to the summary judgment motions by filing an affidavit explaining

why a continuance to allow discovery was necessary, as provided in Rule 56(f), Fed.R.Civ.P.[2] Even now, they do not suggest how discovery could salvage their contract claim from the language of the agreement and the union's articulated reason for refusing to arbitrate their grievance. There is, therefore, nothing to suggest that the district court abused its discretion in ruling on the motions when it did. From their discussion of this procedural issue, the *Bankston* plaintiffs slide into a discussion of collateral estoppel, Pet. 27-30, which has nothing whatever to do with the basis of the district court's judgment.[3]

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[2] The *Bankston* plaintiffs were apparently motivated by a desire to catch up with the *Bache* appeal then pending in the Fifth Circuit. The *Bankston* plaintiffs successfully moved to consolidate the two cases in the court of appeals, and none of the issues identified in their opening brief to the Fifth Circuit concerned the district court's exercise of discretion in ruling on the summary judgment motions when it did. The *Bankston* plaintiffs did assert that they should have been allowed more time for discovery in their reply brief, but this assertion was made in response to the defendants' showing that their affidavits had been insufficient.

[3] With respect to their claim that CWA failed to represent them in their claims for preferential rehiring, the court of appeals found that "the *Bankston* plaintiffs failed to produce evidence, except by vague affidavits with identical conclusory statements, that they have presented these grievances to CWA seeking its representation." App. A-54. In the face of CWA's showing that no such grievances had been requested, this was insufficient to avoid summary judgment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

JOHN QUINN
2000 Southbridge Parkway
Birmingham, Alabama 35209

JAMES B. COPPESS
(Counsel of Record)
1925 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 728-2456

Counsel for Communications Workers of America, AFL-CIO